IN THE

Supreme Court of the United States

October Term, 1975

No. 75-478

PARKER SEAL COMPANY,

Petitioner,

v.

PAUL CUMMINS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF SYNAGOGUE COUNCIL OF AMERICA AND NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, *AMICI CURIAE**

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Constituent Organizations of Synagogue Council of America:

CENTRAL CONFERENCE OF AMERICAN RABBIS, representing the Reform rabbinate;

RABBINICAL ASSEMBLY OF AMERICA, representing the Conservative rabbinate;

RABBINICAL COUNCIL OF AMERICA, representing the Orthodox rabbinate;

UNION OF AMERICAN HEBREW CONGREGATIONS, representing the Reform congregations;

UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, representing the Orthodox congregations;

UNITED SYNAGOGUE OF AMERICA, representing the Conservative congregations.

Constituent Organizations of National Jewish Community Relations Council:

AMERICAN JEWISH COMMITTEE;

AMERICAN JEWISH CONGRESS;

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

JEWISH LABOR COMMITTEE;

JEWISH WAR VETERANS OF THE UNITED STATES;

NATIONAL COUNCIL OF JEWISH WOMEN,

and one hundred local Jewish Community Councils, including all the major cities in the United States.

TABLE OF CONTENTS

	PAGE
Interest of the *Amici*	3
Statutory Provisions and Regulations Involved	5
The Question to Which This Brief Is Addressed	6
Summary of Argument	6
Argument	
Point One—The challenged statute and guideline do not violate the Establishment Clause	7
A. The statute and guideline have a substantial secular purpose	7
B. The primary effect of the 1972 amendment and the 1967 guideline is not to advance religion but to protect the religious freedom of those who observe a day other than Sunday as their holy day of rest	11
C. The challenged statute and guideline do not foster divisive entanglement of governmental and religious activity	15
D. Consistent governmental practice, federal, state and municipal, supports the constitutionality of the challenged statute	18
Point Two—The challenged statute and guideline are necessary and proper measures for the enforcement of the Free Exercise Clause of the First Amendment	21
Conclusion	26

TABLE OF AUTHORITIES

PAGE

Cases:

Abington School District v. Schempp, 374 U.S. 203 (1963) 8

Board of Education v. Allan, 392 U.S. 236, 243 (1968) 8
Braunfeld v. Brown, 366 U.S. 599 (1961) 10

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 773-74 (1973) 8
Cruz v. Beto, 406 U.S. 939 (1972) 16

Engel v. Vitale, 370 U.S. 421, 423, 430 (1962) 20
Epperson v. Arkansas, 393 U.S. 97 (1968) 8

Girouard v. United States, 328 U.S. 61 (1946) 10

Hardison v. T.W.A. Inc., 527 F.2d 33 (8th Cir. 1975) *petition for cert. pending,* 44 U.S.L.W. 3481 (2/24/76) 9
Hunt v. McNair, 413 U.S. 734, 741-742 (1973) 8

Jackson v. Veri Fresh Poultry, Inc., 304 F.Supp. 1276 (E.D. La. 1969) 9
Jenison, In re, 375 U.S. 14 (1963) 24
Jordan v. North Carolina National Bank, 399 F. Supp. 172, 179-80 (W.D.N.C. 1975) 25

Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971) 8
Lemon v. Sloan, 413 U.S. 825, 829-830 (1973) 8

Marsh v. Alabama, 326 U.S. 501 (1916) 22, 23
McColluch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 25
McGowan v. Maryland, 366 U.S. 420, 449 (1961) 8
Meek v. Pittenger, 421 U.S. 349, 358 (1975) 7

PAGE

Reid v. Memphis Publishing Co., 468 F.2d 348 (6th Cir. 1972) *aff'd after remand,* 521 F.2d 512 (1975) 9
Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972) 9

Sherbert v. Verner, 374 U.S. 399 (1963) 24

Tilton v. Richardson, 403 U.S. 672, 678-79 (1971) 8

United States v. Ballard, 322 U.S. 78 (1944) 16
United States v. Kahane, 396 F. Supp. 687 (E.D.N.Y. 1975), *aff'd* 527 F.2d 492 (2d Cir. 1975) 16

Walz v. Tax Commission of the City of New York, 397 U.S. 664, 672-73 (1970) 8, 18
Wisconsin v. Yoder, 406 U.S. 205 (1972) 16, 24

Zorach v. Clauson, 343 U.S. 306, 313 (1952) 8, 11

Statutes:

Civil Rights Act of 1964, Section 701(j), 42 U.S.C. §2000e(j) 5, 6, 21
Civil Rights Act of 1964, Section 703(a), 42 U.S.C. §2000e-2(a) 5, 21
Conn. Gen. Stat. §5-250(c) 18
Equal Employment Opportunity Commission Guideline 1605.1 (29 C.F.R. §1605.1) 5, 20
Fla. Stat. Ann. §231.40(1)(c) 18
N.J. Rev. Stat. 11:14-8 18
N.J. Stat. Ann. §18.14-92.2 20
N.Y. Civ. Serv. Rules and Regs. §21.6 18
N.Y. Educ. Law §3210(1)(6) 20
Universal Military Training and Service Act, Section 6(j), 50 U.S.C. App. 456(j) 16
42 U.S.C. §300a-7 13

PAGE

Miscellaneous:

118 Cong. Rec. H. 1861-62 10

D. Manwaring, F. G. Folsom, "Recent Restrictions Upon Religious Liberty," *American Political Science Review,* XXXVI, December 1942, p. 1053 17

D. Manwaring, *Render Unto Caesar; The Flag Salute Controversy* (1962) Ch. 8 17

Pfeffer, *The Supremacy of Free Exercise,* 61 Georgetown L. Rev. 1115 (1973) 24

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BRIEF OF SYNAGOGUE COUNCIL OF AMERICA AND NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, *AMICI CURIAE*

This brief *amici curiae* is submitted with the consent of the parties.

This proceeding was initiated by respondent Cummins after he was discharged by petitioner Parker Seal Company because he refused to work on Saturday. Respondent is a member of a seventh-day sect, the World Wide Church of

God. After he was discharged, he filed a charge of unlawful discrimination with the Federal Equal Employment Opportunity Commision (EEOC) which administers the federal fair employment law embodied in Title VII of the Civil Rights Act of 1964 (42 U.S.C. Sections 2000e *et seq.*). He also filed a charge with the Kentucky Human Rights Commission alleging violation of that state's fair employment law.

The Kentucky Commission dismissed respondent's charge after a hearing. The EEOC nevertheless issued a right-to-sue letter and respondent accordingly initiated this suit under the federal statute in the United States District Court for the Eastern District of Kentucky. That court, relying on the record before the Kentucky Commission, dismissed respondent's complaint. It found that petitioner had made a reasonable accommodation to respondent's religious needs.

The Court of Appeals for the Sixth Circuit reversed, with one judge dissenting. It held that: (1) the Kentucky Commission's order did not have *res judicata* effect; (2) there was no substantial evidence to support the conclusion that accommodation of respondent's religious practice would have imposed an undue hardship on the employer; and (3) the statutory provisions regarding religious practices did not violate the Establishment Clause, either by requiring employers to foster religion by deferring to their employees' religious requirements or by affording religious employees preferential treatment not accorded to others.

This Court issued its writ of certiorari to review the Court of Appeals' decision.

Interest of the *Amici*

This brief is submitted on behalf of the Synagogue Council of America and the National Jewish Community Relations Advisory Council.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodoz, Conservative and Reform. It is composed of:

Central Conference of American Rabbis, representing the Reform rabbinate;

Rabbinical Assembly of America, representing the Conservative rabbinate;

Rabbinical Council of America, representing the Orthodox rabbinate;

Union of American Hebrew Congregations, representing the Reform congregations;

Union of Orthodox Jewish Congregations of America, representing the Orthodox congregations;

United Synagogue of America, representing the Conservative congregations.

The National Jewish Community Relations Advisory Council is a co-ordinating body comprised of the following national lay Jewish organizations, in addition to the congregational bodies mentioned above, concerned with American Jewish community relations:

American Jewish Committee

American Jewish Congress

Anti-Defamation League of B'nai B'rith

Jewish Labor Committee

Jewish War Veterans of the United States

National Council of Jewish Women

and one hundred local Jewish Community Councils, including all the major cities in the United States.

The organizations affiliated with the Synagogue Council of America and the National Jewish Community Relations Advisory Council include in their membership the overwhelming majority of Americans affiliated with Jewish organizations. We believe, therefore, that in submitting this brief we speak for the greater part of American Jewry.

Our interest in the cases before this Court is twofold. In the first place, the appellees, like members of the Jewish faith, observe the seventh day of the week as their Sabbath and refrain from all secular business and labor on that day. Enforcement of compulsory Sunday observance laws against them constitutes, in our view, a serious infringement of the civil, religious and economic rights of Jews and imposes a heavy burden upon them because of their adherence to their religious beliefs.

However, our concern extends beyond the interests of the particular parties to this litigation. We would be concerned even if the appellees were not observers of the seventh day of the week as the Sabbath. We believe that the principle of religious liberty is impaired if any person is penalized for adhering to his religious beliefs, or for not adhering to any religious belief, so long as he neither interferes with the rights of others nor endangers the public peace or security.

For these reasons we sought and obtained the consent of counsel for the parties to submit this brief *amici curiae*.

Statutory Provisions and Regulations Involved

Section 703(a) of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer—(1) to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion. . . .

Acting under this provision, the EEOC, in 1967, adopted Guidline 1605.1 (29 C.F.R. Section 1605.1), which provides:

> [S]ection 703(a)(1) of the Civil Rights Act of 1964 . . . includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.
>
> [T]he employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

In 1972, Title VII of the 1964 Civil Rights Act was amended by adding the following language as Section 701(j) (U.S.C. Section 2000e(j)):

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless

an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The Question to Which This Brief Is Addressed

This brief is addressed to the question of the constitutionality, under the First Amendment, of Section 701(j) of the Civil Rights Act of 1964 (and a regulation that preceded it), which defines "religion," as used in the section of that Act forbidding discrimination in employment because of religion, to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's religious observance or practice without undue hardship on the conduct of the employer's business."

Summary of Argument

I. The challenged statute and guideline do not violate the Establishment Clause of the First Amendment since they have a clearly recognizable secular purpose, their primary effect is neither to advance nor inhibit religion, and neither the statute and guideline nor their administration involve excessive government entanglement with religion. By statute and practice, the Federal government and many state and municipal governments have long done and now do exactly what the challenged measures mandate and it is inconceivable that during this period they all have been violating the Establishment Clause.

II. Not only do the challenged statute and guideline not violate the Establishment Clause but their validity can be sustained under the "necessary and proper" clause of Article I, Section 18, of the Constitution, as applied to the Free Exercise Clause of the First Amendment.

ARGUMENT

POINT ONE

The challenged statute and guideline do not violate the Establishment Clause.

In *Meek* v. *Pittenger*, 421 U. S. 349, 358 (1975), this Court expressed the three-part test for validity of a statute challenged under the Establishment Clause. "First," it said, "the statute must have a secular legislative purpose. Second, it must have a primary effect that neither advances nor inhibits religion. Third, the statute and its administration must avoid excessive governmental entanglement with religion." Petitioners claim that the statute and regulation challenged herein fail under each of these tests. We believe there is no validity to this claim in respect to any part of the three-pronged test.

A. The statute and guideline have a substantial secular purpose.

In respect to the first of these prongs, we note that this Court has never found any statute enacted by Congress to be lacking a substantial secular purpose and only twice has it made such a finding in a challenge to a state statute. The claim of illegitimacy of purpose has been made often

but, with the two exceptions, it has consistently been rejected. *McGowan* v. *Maryland*, 366 U. S. 420, 449 (1961) (Sunday closing law); *Tilton* v. *Richardson*, 403 U. S. 672, 678-79 (1971) (inclusion of church-related colleges under the Higher Education Facilities Act of 1963); *Board of Education* v. *Allen*, 392 U. S. 236, 243 (1968) (aid to parochial schools); *Lemon* v. *Kurtzman*, 403 U. S. 602, 612-13 (1971) (same); *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U. S. 756, 773-74 (1973) (same); *Lemon* v. *Sloan*, 413 U. S. 825, 829-30 (same); *Hunt* v. *McNair*, 413 U. S. 734, 741-42 (1973) (aid to church-related colleges); *Walz* v. *Tax Commission of the City of New York*, 397 U. S. 664, 672-73 (1970) (tax exemption for houses of worship).

The two exceptions are *Abington School District* v. *Schempp*, 374 U. S. 203 (1963) (law requiring Bible reading in public schools), and *Epperson* v. *Arkansas*, 393 U. S. 97 (1968) (law banning teaching of evolution in public schools). Both of these cases involved affirmative religious intrusions into the public schools. Neither involved excusing children from school attendance on their Sabbath or holy days. That the Court has not questioned the constitutionality of such excusals is strongly suggested by *Zorach* v. *Clauson*, 343 U. S. 306, 313 (1952), which is far more apposite to the present case than *Abington* and *Epperson*.

With all due respect, the claim that the challenged statute lacks a secular legislative purpose borders on the frivolous. The logic of the claim is that any statute or constitutional claim seeking to protect the free exercise of religion, including the Free Exercise Clause of the First Amendment, lacks a secular purpose.

The only evidence submitted by petitioner to support this claim are remarks made in 1972 by Senator Randolph in sponsoring the amendment to the 1964 Act that became Section 701(j). The remarks quoted in the petitioner's brief (pp. 21-23), hardly support the claim and they are at least equally understandable as support of an amendment seeking to protect the religious liberty of those observing a day other than Sunday as their holy day of rest.

But there is a more serious flaw in petitioner's argument. As petitioner recognizes in its brief (pp. 17-18), respondent's claim arose before the 1972 amendment was adopted and accordingly was governed by the law at the time he was discharged. Hence, petitioner argues, as indeed it must, that the 1967 guideline upon which respondent's claim was initially based was itself lacking a secular purpose. The 1972 amendment is practically a verbatim incorporation of the relevant 1967 guideline. The Federal District Courts and Courts of Appeal passing upon claims under the guideline identical with that of the respondent herein had no difficulty regarding its constitutionality. *Jackson* v. *Veri Fresh Poultry, Inc.*, 304 F. Supp. 1276 (E.D. La. 1969); *Riley* v. *Bendix Corp.*, 464 F. 2d 1113 (5th Cir. 1972); *Reid* v. *Memphis Publishing Co.*, 468 F. 2d 346 (6th Cir. 1972), *aff'd after remand*, 521 F. 2d 512 (1975). *Accord, Hardison* v. *T.W.A. Inc.*, 527 F. 2d 33 (8th Cir. 1975), petition for cert. pending, 44 U.S.L.W. 3481 (2/24/76).

Petitioner herein recognizes this and explains the amendment as only an effort to remove some doubts as to whether the 1967 guideline was authorized by Title VII as it then read (Brief, p. 17). If this is so, and we have no doubt

that it is, Senator Randolph's remarks in 1972 are clearly irrelevant.

The purpose of the 1972 amendment is quite obvious—and plainly secular. It was not to change existing law but to codify it. Its specific purpose was, as petitioner notes, to remove the doubts as to EEOC's statutory authority to issue the very guideline upon which respondent herein based his claim in the first instance. See 118 Cong. Rec. H. 1861-62.

An analogous situation was the enactment by Congress in 1952 of a provision in the Immigration and Nationality Act codifying the decision of this Court in *Girouard* v. *United States,* 328 U. S. 61 (1946), which had held that the existing law did not bar naturalization of religious pacifists. The only difference between the two situations is that, in the present case, Congress sought to codify a number of consistent District Court and Court of Appeals decisions rather than a single decision of this Court. We suggest that this difference hardly supports a claim that the purpose of the 1972 amendment was purely sectarian.

Finally, we submit that petitioner's reliance on the "Sunday closing" cases (Brief, pp. 27-28) is likewise unsound. Petitioner particularly relies on *Braunfeld* v. *Brown,* 366 U. S. 599 (1961), in support of its position. However, in the plurality opinion in that case, Chief Justice Warren noted that a number of states provide by statute for an exemption for Sabbatarians "and this may well be the wisest solution to the problem" (at p. 608). Here, Congress has done exactly that. Petitioner's claim that it may not constitutionally do so is plainly inconsistent with Chief Justice Warren's opinion.

B. The primary effect of the 1972 amendment and the 1967 guideline is not to advance religion but to protect the religious freedom of those who observe a day other than Sunday as their holy day of rest.

The immediate obvious effect of the challenged statute and guideline, we submit, is not to advance religion but to relieve to some extent (*i.e.,* where the relief would be reasonable and would not impose undue hardship on the employer) the economic burden borne by a minority of Americans by reason of their faithful adherence to religions which do not conform to the majority's belief as to which day of the week God commanded abstention from labor. (As we seek to show below, the relief actually extends to a much broader class.) Of course, of those relieved by the statute and guideline from being required to go to work on Saturdays, some may attend church or synagogue on that day where otherwise they would be at work. But this, we suggest, is a slim reed to support a contention that this Court should nullify an act of the Congress, particularly one which does no more than codify existing practices of the Executive Department.

In *Zorach* v. *Clausen,* 343 U.S. 306 (1952), this Court upheld the constitutionality under the Establishment Clause of a law permitting the release of public school pupils if and only if they used the released period to participate in religious instruction. That law advanced religion far more than one that simply excused children from attending public schools on their days of religious observance, which would be the equivalent of the law and guideline challenged in the present suit. Nevertheless, the Court upheld the constitutionality of that law on the ground that its substantial

purpose and effect were not to advance religion but to accommodate the school attendance law to the religious needs of the children and their parents.

(Parenthetically we note that petitioner's concern that "churches holding services on Saturdays may enjoy a somewhat larger attendance with a correspondingly fuller collection plate" (Brief, p. 29) is hardly relevant in respect to the Orthodox and many Conservative Jews for whom we speak, since the same Mosaic law which forbids them to work on Saturdays also forbids them to carry or handle money on that day.)

Petitioner asserts that the challenged provisions "effect favoritism among the sects" and "impose on employers the views of those who observe the Sabbath on Saturdays, or who otherwise believe that their religious views mandate deference by others" (Brief, p. 30). There are many things wrong with that argument. In the first place, the statutory coverage is not limited to those who observe the Sabbath on Saturday. The statute does not even mention Saturday. It applies equally to Moslems, whose Sabbath is Friday and to those sects or even individuals who genuinely believe that Monday or Tuesday or any other day of the week is the divinely commanded day of rest. Indeed, perhaps most important, it applies to Sunday-observing Christians employed by a Sabbatarian in a state which does not have a Sunday closing law, or in any of the many industries and other enterprises that are permitted to operate seven days a week.

In the second place, because most states do have Sunday closing laws or do close on Sundays because of collective bargaining factors, the owner's personal religious predilections, or similar reasons, the primary effect of the statute is not to advance the religion of Saturday-observers but is rather to equalize or, more accurately, to diminish to some extent the inequality between adherents of the majority religion and those of minority faiths.

Finally, the statute is not limited to abstention from work on a Sabbath, whether it be Saturday, Sunday or any other day of the week. It applies equally, for example, to Catholic and many non-Catholic physicians, nurses and other hospital employees who for religious reasons refuse to participate in an abortion procedure, to hospital employees who as members of the Jehovah's Witness sect refuse for religious reasons to participate in a blood transfusion procedure, and to sales clerks in pharmacies who have religious scruples against selling contraceptives. Without expressing an opinion one way or the other on whether these persons should be protected from dismissal (*cf.* 42 U.S.C. §300a-7, which gives certain protections to persons having religious scruples concerning sterilization and abortion), we submit that their obvious inclusion in the challenged statute and guideline negates the contention that their purpose and/or primary effect is to advance the religion of those who, like respondent herein, observe a day other than Sunday as their divinely ordained day of rest.

On page 33 of its brief, petitioner asserts that the "very narrowness of the class benefited by the accommodation provisions underscores that the primary impact is forbidden religious advancement." But, as we have shown, the class benefited is not narrow at all; it extends to all whose

religious convictions impel some accommodation on the part of the employer. It benefits, for example, the conventional Sunday-observing Christian who happens to be employed by a Sabbatarian or by an employer who keeps his business open seven days a week. It benefits the Catholic or member of any other faith that forbids participation in abortions, the store clerk who will not sell contraceptives, the Jehovah's Witness who will not salute the flag or pledge allegiance to it or cooperate in a blood transfusion and the Quaker civil service employee in a state which imposes an oath of office but does not permit an affirmation in lieu thereof. In all these instances and others that could be cited, the statute and guideline benefit not a narrow class but a class which in one instance or another may encompass a majority of Americans.

Moreover, even if the purpose of the challenged statute were to benefit a narrow class, that would hardly require its invalidation. The very purpose of the Establishment Clause, and of the Free Exercise Clause as we will shortly indicate, is to benefit "narrow" classes. No First Amendment is needed to protect members of large, conventional religions.

Finally, we submit that petitioner is in error in relying on this Court's decisions forbidding governmental financial aid to religious schools (Brief, pp. 32-33). Those decisions forbid the state to pay for educational services which it may itself not constitutionally furnish. The statute challenged here makes no such demand. It does not compel the employer to pay for services which, by reason of his religious convictions, the employee may not furnish or which, because of the First Amendment, the employer may not accept. If

a Sabbatarian performs only four days' service weekly, the statute does not compel the employer to pay him for five. And, if the employee's absence from work on his Sabbath causes undue hardship on the conduct of the employer's business, the employer may lawfully discharge him. The religious school aid decisions forbid government to finance the operation of religious educational institutions. No religious institution, educational or otherwise, is financed directly or indirectly by the operation of the statute and guideline challenged herein.

C. The challenged statute and guideline do not foster divisive entanglement of governmental and religious activity.

In support of its claim that the challenged statute fosters divisive entanglement of government in religious matters, petitioner quotes from the dissenting opinion in the court below that "[d]isposition of complaints under the [1972] amendment will require inquiry into the sincerity with which beliefs are held and force consideration of the validity of the religious nature of the claims . . ." (Brief, p. 35). We are not certain what is meant by the phrase "the validity of the religious nature of the claim," but we assume that it means no more than that the claim is motivated by religious rather than nonreligious factors, and not that the employee's claimed religion does in fact impel him not to work on Saturdays. If we are correct in our assumption, it is simply another way of saying that the belief contemplated by the 1972 amendment must be sincerely held. The necessity imposed on government to make this inquiry and reach a determination thereon, petitioner asserts, will result in excessive government entanglement with religion.

Acceptance of this contention, we submit, would make an absurdity of the Free Exercise Clause, for it would mandate acceptance of any claim, no matter how frivolous, or rejection of all claims, no matter how sincere, made thereunder. More than 30 years ago, this Court held in *United States* v. *Ballard,* 322 U.S. 78 (1944), that it is constitutional to allow a jury, in a prosecution for obtaining property under false pretenses relating to religion, to decide whether the defendants believed in the truth of the representations they made. In many thousands of cases, Selective Service boards have been required under Section 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. 456(j), to pass on the sincerity of claims to a "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation." In *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), this Court upheld the right of parents under the Free Exercise Clause to withhold their children from attendance at secondary. schools if they believed that their religious conscience would be violated by allowing them to attend. In *Cruz* v. *Beto,* 406 U.S. 939 (1972), this Court held that the Free Exercise Clause protected a prisoner's right to participate in religious services. See also *United States* v. *Kahane,* 396 F. Supp. 687 (E.D.N.Y. 1975), *aff'd,* 527 F. 2d 492 (prisoner's right to nutritionally adequate food which is compatible with religious dietary restrictions).

In all of these situations, acceptance of the constitutional claim depends on a judgment as to the sincerity of the asserted religious belief.

On p. 37 of its brief, petitioner notes that the exemption from Saturday service enjoyed by respondent caused resentment on the part of his fellow-workers. Any such resentment can hardly be compared to the resentment expressed by millions of draftees (and their parents) who could not validly claim religious exemption and were therefore required to serve. The arousal of resentment by religious minorities asserting their constitutional or statutory rights is by no means unusual. The sad history of the reaction to the refusal of Jehovah's Witnesses to allow their children to salute the flag in public school exercises testifies to that. See D. Manwaring and F. G. Folsom, "Recent Restrictions Upon Religious Liberty," *American Political Science Review,* XXXVI, December 1942, p. 1053; D. Manwaring, *Render Unto Caesar: The Flag-Salute Controversy* (1962), Chapter 8. This, however, is the price which must be paid for the preservation of religious freedom, a price which our history establishes the people have been willing to pay.

Whenever a governmental body is required to pass on a religion-based claim, some entanglement with religion is unavoidable. Were that entanglement fatal, no law exempting religious institutions from taxation would be constitutional. All religious incorporation laws would be invalid. Laws forbidding the sale of alcoholic beverages within specified distances of houses of worship would be unconstitutional, for in each case the governmental body mandated to enforce the law would be forbidden to determine whether the claimant for protection was truly a house of worship. Laws exempting Christian Scientist and other practitioners of faith healing from laws regulating medical practice could not stand. Public school children could not be released for religious instruction since the school authorities could not determine whether the instruction was truly religious. Military chaplaincies could be outlawed, for the military authorities would be barred from passing judgment

on whether the applicant was truly a chaplain and, if so, whether he was a competent one. Ministers could not be exempt from military or jury service. "Church Entrance—No Parking" signs would have to be removed. And innumerable other instances of legal determinations of claims based upon religion would have to be discontinued.

It is for this reason that the third prong of the test upon which petitioner relies mandates only *excessive* government entanglement with religion. A statute which seeks to forbid discrimination in employment because of religion necessarily imposes upon governmental agencies, whether judicial or administrative, the obligation to determine whether a claim asserted thereunder is valid and a review of the claim for that purpose can hardly be held to entail forbidden excessive entanglement.

D. Consistent governmental practice, federal, state and municipal, supports the constitutionality of the challenged statute.

In *Walz* v. *Tax Commission,* 397 U.S. 664 (1970), this Court held that the practical universality of tax exemption for religious institutions is strong evidence of its constitutionality. While the practice of arranging the working schedule of governmental employees who are Sabbatarians so as not to compel them to violate their religious obligations may not be quite as universal as tax exemption for churches, it is sufficiently widespread so as to present strong evidence that it is constitutional. See, *e.g.,* Conn. Gen. Stat. §5-250(c); Fla. Stat. Ann. §231.40 (1)(c); N.J. Rev. Stat. 11:14-8; N.Y. Civ. Serv. Rules and Regs. §21.6. Generally, only where the employee's seven-

day availability for service is critically important to the performance of his duties—the functional equivalent of "undue hardship on the conduct of the employer's business" in the statute challenged herein—is a Sabbatarian compelled to choose between the loss of his position or the violation of his religious obligation.

Government, under our system, must act in accordance with law, and the Constitution is the supreme law of the land. If it is a violation of the Establishment Clause for the government to require other employers to make reasonable accommodations so as not to compel their employees to violate their religious obligations by working on their holy day of rest, it is no less a violation if the government, as employer itself, makes such accommodations.

It is no answer that the accommodation made by the government does not injure anyone whereas, if it is made by a private employer, he and/or the Sabbatarian's fellow employees may be injured by it. Under the statutory provision challenged herein, the Sabbatarian employee is not entitled to relief if accommodation would be unreasonable or would cause undue hardship on the conduct of the employer's business. Conversely, it can hardly be urged that the exemption from military service enjoyed by clergymen and religious objectors to military service does not injure draftees who otherwise would not have been called to service.

Nor is it a sufficient answer that the government acts voluntarily whereas the private employer acts under compulsion of statutory law. In the first place, it is doubtful that, in our political system, any action of government can

be said to be voluntary and not under compulsion of law. Secondly, whatever the case may be under the Free Exercise Clause, the voluntariness of the challenged action is irrelevant in judging whether it is violative of the Establishment Clause. See *Engel* v. *Vitale*, 370 U.S. 421, 423, 430 (1962), where it was held that neither the fact that introduction of prayer recitation in public schools was voluntary on the part of a school board nor the fact that participation by the pupils was likewise voluntary immunized the practice from successful challenge under the Establishment Clause. Finally, in many cases the government, federal, state or municipal, does act in compliance with statutory law, as when it accords exemption from military service to religious pacifists, or provides for absentee voting when a primary or election day falls on a religious holiday, or exempts from the sanctions of the compulsory school attendance law those children whose absence is dictated by the fact that a particular school day falls on a holiday sacred to them. See, *e.g.*, N.J. Stat. Ann. §§18.14-92.2; N.Y. Educ. Law §3210(1)(6).

Concluding this part of our brief, we urge that there is no validity to the claim that either Section 701(j) of the Civil Rights Act of 1964 or Guideline 1605.1 of the United States Equal Employment Opportunity Commission which preceded it, violates the Establishment Clause of the First Amendment to the Constitution.

POINT TWO

The challenged statute and guideline are necessary and proper measures for the enforcement of the Free Exercise Clause of the First Amendment.

The First Amendment bars not only laws respecting an establishment of religion but also measures that prohibit its free exercise. While we do not have in this case a statute or other formal governmental regulation forbidding an employer from making a reasonable accommodation to an employee's religious observance or practice, we believe that enactment of the statute challenged here was within the power of Congress, under the Necessary and Proper Clause of Article I, Section 8 of the Constitution, to carry out the provisions of the Free Exercise Clause of the First Amendment.

Preliminarily, it should be noted that, as petitioner concedes, Congress had clear power, under the Commerce Clause, to enact that part of the 1964 Civil Rights Act (Section 703(a)(1)) which forbids discriminatory employment practices on the basis of religion. The power of Congress under the Commerce Clause to enact Section 701(j), we submit, is equally clear.[1] Petitioner is in effect arguing here that this Court must restrict Congress' powers under the Commerce Clause in order to prevent an impairment of the Religion Clause. We suggest that, on the contrary, this Court may and should uphold the statute as a

1. We do not, of course, suggest that, if Section 701(j) violates the Establishment Clause, it may nevertheless be upheld under the Commerce Clause. We believe we have shown, in Point One above, that it does not.

proper and consistent exercise of Congressional powers under both clauses. Such a result would be consistent with the principle that the courts should read constitutional commands in a way that makes them consistent with each other rather than in a way that would require the sacrifice of one in order to carry out the other.

The power of Congress to act affirmatively to protect freedom of religion was strongly suggested by this Court in *Marsh* v. *Alabama*, 326 U.S. 501 (1946). The Court there held that, under the Free Exercise Clause, a company wholly owning a town could not bar colporteurs from distributing religious tracts on its streets. In reaching that result, the Court specifically suggested (although Justice Frankfurter expressed the view (at p. 511) that it was not necessary to do so) that the same result could have been reached by Congressional action under the Free Exercise Clause. It said (p. 507, n.4):

> And certainly the corporation can no more deprive people of freedom of press and religion than it can discriminate against commerce. In his dissenting opinion in Jones v. Opelika, 316 U.S. 584, 600, ... which later was adopted as the opinion of the Court, 319 U.S. 103, 194, ... Mr. Chief Justice Stone made the following pertinent statement: "Freedom of press and religion, explicitly guaranteed by the Constitution, must at least be entitled to the same freedom from burdensome taxation which it has been thought that the more general phraseology of the commerce clause has extended to interstate commerce. Whatever doubts may be entertained as to this Court's function to relieve, *unaided by Congressional legislation*, from burdensome taxation under the commerce clause, ... it cannot be thought that that function is wanting under

> the explicit guaranties of freedom of speech, press and religion." (citations omitted; emphasis added.)

The power of Congress to protect interstate commerce from interference, by burdensome taxation or otherwise, extends to interference by private enterprises like petitioner as well as to interference by states. In the present case, Congress has enacted legislation of the kind suggested in *Marsh*. What we are here suggesting is that that action can be viewed as an exercise of Congressional powers under both the Commerce and Free Exercise Clauses.

We do not urge, nor is it necessary for this Court to decide, that, if Section 703(a)(1), the EEOC Guidelines and the 1972 amendment had not been adopted, an employer would nevertheless be prohibited from barring Sabbatarians from employment by virtue of the Free Exercise Clause alone. We submit only that the Necessary and Proper Clause, invoked under the Free Exercise Clause, empowers Congress and the EEOC to adopt the statute and regulations that are challenged here. Just as this Court found in *Marsh* that the predominant position of the company in the town required invoking the protections of the Free Exercise Clause, Congress could properly find that the power of employers operating in interstate commerce to exclude Sabbatarians from employment constituted such a threat to their religious freedom as to require Congressional action, applicable to all such employers alike, preventing such an exclusion. In this respect, the 1972 amendment stands on the same footing as the basic provision in the 1964 Act prohibiting discrimination based on religion. That provision also finds support in the power of Congress

to protect the free exercise of religion,[2] just as the prohibition of racial discrimination finds support in the power of Congress to implement the Fourteenth Amendment.

The trend of this Court's decisions in recent years has been toward broad interpretation and application of the Free Exercise Clause.[3] Thus, in *Sherbert* v. *Verner*, 374 U.S. 399 (1963), this Court held that a denial of unemployment compensation benefits to a worker who, like respondent herein, could not conscientiously accept employment that required her to work on Saturday, violated the Free Exercise Clause. In the case of *In re Jenison*, 375 U.S. 14 (1963), this Court held that a woman whose religious conscience forbade her from serving on juries because it would violate the Biblical command, "Judge not that ye be not judged," could not, consistent with the Free Exercise Clause, be held in contempt of court. And in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), this Court held that the Free Exercise Clause forbade prosecution under a state's compulsory school attendance law of Amish parents whose religious conscience would not allow them to send their children to secondary schools.

We submit that equal liberality in the interpretation of the First Amendment is called for when this Court is passing on the validity of a Congressional enactment which has both the intent and effect of protecting the free exercise

2. Although petitioner argues at page 38 of its Brief that Title VII was not designed "to implement the Bill of Rights," it states at an earlier point (page 15) that "the free exercise interests of employees . . . are already served by the original proscription in Title VII of religious discrimination in private employment."

3. For a fuller development of this point, we respectfully refer the Court to Pfeffer, *The Supremacy of Free Exercise*, 61 Georgetown Law Rev. 1115 (1973).

of religion. In such a case, the classic words of John Marshall in *McColluch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), are particularly appropriate:

> . . . Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

The conclusion we urge here was reached in *Jordan* v. *North Carolina National Bank*, 399 F. Supp. 172, 179-80 (W.D.N.C. 1975), a well-reasoned decision which we commend to the Court's attention. In the last paragraph of that part of the District Court's opinion which deals with the Free Exercise claim, the Court said:

> Congress, as evidenced by the debates relating to the 1972 Amendments to Title VII felt §2000e(j) furthered First Amendment freedoms. Senator Harrison Williams in discussing §2000e(j) quoted the pertinent portion of the First Amendment and stated "In dealing with the free exercise thereof, really, this [*i.e.*, §2000e(j)] promotes the constitutional demand in that regard." "Legislative History of the Equal Employment Opportunity Act of 1972", p. 715.

Conclusion

It is respectfully submitted that, for the reasons stated above, this Court should affirm the ruling of the court below upholding the constitutionality of §701(j) of the Civil Rights Act of 1964, as amended, and EEOC Guideline 1605.1.

Respectfully submitted,

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